Supreme Court, U. S.
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Supreme Court of the United States

No. 75-1050

COMMONWEALTH OF VIRGINIA, EX REL.,
STATE AIR POLLUTION CONTROL BOARD,
Petitioner,

v.

RUSSELL E. TRAIN, ADMINISTRATOR, AND
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRELIMINARY STATEMENT

The Commonwealth of Virginia, ex rel., the State Air Pollution Control Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on October 28, 1975.

OPINION BELOW

The opinion of the court below is reported at 521 F.2d 971 (D.C. Cir. 1975) and appears as Appendix A. (The pagination of the decision, as contained in the Appendix, reflects the first printing by West Publishing Co., and not that of the Reporter volume.)

STATUTORY PROVISIONS INVOLVED

The statutory and regulatory provisions involved are set forth in the Appendix and include:

(1) Section 110(a) of the Clean Air Act, 42 U.S.C. § 1857c-5(a)

(2) Section 110(c)(1) of the Clean Air Act, 42 U.S.C. § 1857c-5(c)(1)

(3) Section 113 of the Clean Air Act, 42 U.S.C. § 1857c-8

(4) Section 116 of the Clean Air Act, 42 U.S.C. § 1857d-1

(5) Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 1857h-5(b)(1)

(6) Washington Metropolitan Area Transportation Company, Pub. L. 89-774, 80 Stat. 1324 (Va. Acts 1966, Ch. 2), Title III, Article VII, § 16

(7) 40 C.F.R. Part 52, Subpart J (D.C.) V (Maryland), and VV (Virginia)

JURISDICTION OF THE COURT

The judgment of the court below was entered on October 28, 1975. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Administrator of the United States Environmental Protection Agency has the statutory authority to preempt a state's registration law, by conditioning the continued operation of such law upon the incorporation

therein of the results of a federally established emission inspection?

2. Whether the Administrator of the United States Environmental Protection Agency has the constitutional and statutory authority to require a state to construct exclusive bus lanes and make a commitment to purchase additional buses.

3. Whether the Commnowealth of Virginia can be regarded as the owner and operator of a bus fleet, when in fact such bus fleet is owned and operated by the Washington Metropolitan Area Transit Authority?

STATEMENT OF THE CASE

This is an appeal from a judgment which affirmed, in part, and vacated, in part, certain regulations promulgated by the Administrator of the U.S. Environmental Protection Agency on December 6, 1973. The petitioner herein had sought judicial review of these regulations by filing a petition for review pursuant to § 307(b)(1), 42 U.S.C. § 1857 h-5(b)(1) (App. B) of the Clean Air Act, 42 U.S.C. 1857, *et seq*. The petition was originally filed in the United States Court of Appeals for the Fourth Circuit, but was transferred to the court below, the Court of Appeals for the District of Columbia Circuit, upon motion of the respondent Administrator.

The regulations under review purport to be a transportation control plan, for the National Capital Air Quality Control Region, promulgated by the Administrator under § 110(c), 42 U.S.C. § 1857c-5(c), (App. B) of the Clean Air Act. They were promulgated after the Administrator disapproved the transportation control plans submitted by Virginia, Maryland and the District of Columbia on the

grounds that they contained certain regulatory and enforcement deficiencies, including the failure of the jurisdictions to guarantee that the necessary state laws and appropriations would be forthcoming. Confronted with these deficiencies, the Administrator prepared his own "plan," which consisted primarily of regulations which ordered the governments involved to submit the missing elements and correct the deficiencies. Thus, these regulations directed the states to develop a motor vehicle emission inspection program, to provide the laws, regulations, financing, administration and enforcement necessary for such a program. In a similar fashion, the regulations also directed the states to develop and enforce a program which would require the installation of retrofit air pollution control devices on motor vehicles. The regulations directed local governments to enforce a ban against on-street parking under certain circumstances. The regulations required Virginia, Maryland and the District of Columbia to construct several exclusive bus lanes and to make financial commitments to enable the Washington Metropolitan Area Transit Authority to purchase 475 additional buses by 1977. The three governments were also directed to construct a total of 180 miles of new commuter bicycle lanes. Failure to carry out any of these duties would result in the application of the sanctions found at § 113, 42 U.S.C. § 1857c-8 (App. B).

These regulations were challenged by the petitioner on the basis that they were beyond the statutory and constitutional powers of the Administrator and also that they were arbitrary and capricious. The court below held that the Clean Air Act required the Administrator, not the states, to develop and promulgate the substitute regulations when state-submitted plans are found to be inadequate. The court also held that the Administrator could not constitutionally compel the states to administer and enforce his regulations.

Such requirements were therefore vacated. The court held, however, that the Administrator could prevent the states from registering vehicles which do not pass the federally established emission inspection, and the states could also be compelled to construct the bus lanes and make the commitment to provide the additional buses. The requirements for 180 miles of commuter bicycle lanes were vacated, inasmuch as the only evidence for them in the record consisted of some survey taken in Philadelphia.

The Administrator had also promulgated similar transportation control plans in other regions of the nation, and these promulgations were also challenged, in certain instances, by the affected states. The various Circuit Courts of Appeals which heard these challenges issued decisions which differ, in varying degrees, from the decision of the court below. *In Pennsylvania* v. *E.P.A.*, 500 F.2d 246 (3rd Cir. 1974), the Third Circuit held that the Administrator had both statutory and constitutional authority to order Pennsylvania to develop, administer, legislate for, and enforce the requirements for inspection and maintenance, retrofits, bus lanes, etc. In *Brown* v. *E.P.A.*, 521 F.2d 827 (9th Cir. 1975), and *Maryland* v. *E.P.A.*, ... F.2d ..... (4th Cir. 1975), the Ninth and Fourth Circuits, respectively, held that the Clean Air Act did not authorize the Administrator to require the states to correct the deficiencies in their submitted plans or to otherwise be ordered to act as the Administrator's servants. Rather, the Administrator was to develop, administer and enforce the plan, when the states chose not to. Having ruled on the statutory question, these two Circuits thereby avoided the constitutional question, although both strongly suggested that the powers asserted by the Administrator would be unconstitutional, had they in fact been found in the Clean Air Act.

ARGUMENT

A.

The Court Below Erred In Affirming The Lawfulness Of The Administrator's Regulations To The Extent That They Prohibit The States From Registering Vehicles Which Do Not Conform To A Federal Inspection.

The court below held that the Administrator, acting pursuant to Congressional authority, could prescribe a rule which would prohibit Virginia from registering a motor vehicle which does not have a certificate of compliance from a federally-established emission inspection.* In effect, this regulation would allow the continued operation of Virginia's registration law only if Virginia refuses to register persons who do not comply with the federal emission inspection. In essence, therefore, the court below has held that the Administrator may preempt the Virginia registration law, unless it is consistent with the Administrator's regulation.

The registration of motor vehicles is well within the police power of the states. It is a well-settled rule that a statute enacted in the execution of a reserved power of a state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution unless the repugnance or conflict is so direct and positive that the two cannot be reconciled or stand together. *Savage* v. *Jones,* 225 U.S. 501, 535 (1912). As this Court has stated in *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963), ". . . federal regulation of a field of commerce should not be deemed preemptive of state regulatory powers in the absence of persuasive reason—either that the nature of the regulated subject permits no other conclusion, or that Congress has unmistakably so ordained." In the present case, the Administrator has the undisputed statutory power to inspect motor vehicles and to prohibit them from operating if they fail his inspection. The registration laws of Virginia do not conflict with the Administrator's powers. Compliance with the federal inspection merely becomes an additional requirement which is imposed before one can operate a motor vehicle. The Administrator can utilize a decal system to indicate compliance or noncompliance with his inspection, and he can obtain a list of vehicle registrations from the Commonwealth, if he needs them. Pursuant to § 46.1-32 of the Code of Virginia (1950), as amended, (App. B), registration lists are available for purchase.

* The regulations in question appear at 40 C.F.R. §§ 52.2441(d); 52.2444(e), 52.2446(e), 52.2447(e), (App. A, pp. 319, 320, 322-327). The court below affirmed these regulations only to the extent that they restrain the operation of state registration. The court did not affirm the portion of the E.P.A. regulations which purported to require Virginia to not allow the nonregistered vehicles to operate.

The situation involved in the present case is, in effect, the reverse of the situation found in *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960). There, the federal government was the licensing authority, and the city was the authority which regulated air pollution. This Court found no conflict in the concurrent exercise of each government's powers. The purpose of the Detroit air pollution ordinance was to enhance the cleanliness of the community. The mere possession of a federal license was no immunity from the normal incidence of the local police power. In the same way, the mere possession of a state registration is no immunity from the incidence of the federal commerce power. A state registration indicates nothing more than compliance with certain state requirements; it does not compel anyone to operate a vehicle in violation of any federal requirement. Indeed, at present, the state requires registration of certain vehicles used as interstate carriers, even though these ve-

hicles must also be certified in accordance with federal interstate commerce regulations. There is no conflict between the two; the owner can comply with both.

Since there is no conflict in practice between state registration and federal emission inspection, we must look to the other aspect of the rule regarding preemption, as described in the *Florida Lime and Avocado Growers* case, *supra:* the question whether Congress has *unmistakably* ordained preemption. We find no such unmistakable expression, in the Clean Air Act, that Congress intended that a state registration law should be preempted in such a way that it can no longer continue unless it incorporates or depends upon the results of a federal emission inspection.

There are, of course, sections of the Clean Air Act which do unmistakably authorize degrees of preemption of state laws. A clear expression of preemption, for example, is found at § 116 of the Act, which states, in part,

> ". . . that if an emission standard limitation is in effect under an applicable implementation plan or under §§ 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation made under such plan or section." 42 U.S.C. § 1857d-1 (App. B).

The Virginia registration law does not specify compliance with any emission standard or limitation, as a precondition to registration. To the extent that the Virginia law would specify an emission standard which might be less stringent than that specified by the Administrator, then only that portion of the law would be preempted. Otherwise, the Virginia registration law is not an air pollution control measure; it is a police regulation, the primary purpose of which is to identify the ownership of motor vehicles. There is no clear and unmistakable expression, in the Clean Air

Act, of Congressional intent to preempt this police power, by preconditioning the continued operation of the registration law upon incorporation therein of federal inspection results. It must be noted in this regard that the court below did not point to any express provision in the Act which clearly authorizes such preemption. The Court merely concluded, in the briefest fashion, that such authorization existed.

Accordingly, it is respectfully submitted that the lower court erred in affirming the lawfulness of those portions of the Administrator's regulations which restrain, or preempt, the operation of a state's registration laws, except upon the incorporation of the results of a federally-established emission inspection.

B.

The Lower Court Erred In Holding That The Administrator Has The Constitutional And Statutory Power To Expend Vast Sums Of State Money To Regulate Pollution Sources Caused By The General Public Through The Construction Of Exclusive Bus Lanes And Commitments To Purchase Buses For Another Agency.

The court below said of the Clean Air Act, that ". . . the language in the statute is broad enough to include authority to require that the states conform *their transportation systems* to federal standards, e.g. by constructing exclusive bus lanes or expanding their bus fleets." (App. A, p. 281; emphasis added.) "The streets and highways and *bus systems of the states* are not being regulated by the Administrator as direct emitters of pollution but rather as factors which influence the use of pollution sources by other parties. We believe that these *state-owned transportation systems* are analogous to the railroad operated by the state in *United States* v. *California, supra.* This situation is similar to federal statutes passed in the 1890's requiring the railroad to operate safe trains." (App. A, p. 288; emphasis added.)

It is respectfully submitted that the lower court and the Administrator have found a state-owned transportation system and bus fleet where none exists. Buses in the geographical area in question are the property of and are operated by Washington Metropolitan Area Transit Authority, a completely separate and autonomous public body. Chapter 2, Article V, § 12, [1966] Virginia Acts of Assembly 5, 10. The Commonwealth of Virginia neither owns nor operates any such bus fleet. The Commonwealth does not own or operate any transportation system in any location; at most, it owns, maintains, and regulates a highway system, only one element in a transportation system. That system is available to and is traversed daily by the general public for purposes of commerce and pleasure.

The lower court also said of the Clean Air Act, ". . . However, an analysis of the language of the Act, and particularly of its enforcement provisions, does not appear to support the Administrator's claim that Congress intended to authorize him to regulate sources of pollution *caused by the general public* by requiring the states to enact statutes and to administer and enforce the programs contained in the EPA plan." (App. A, p. 281; emphasis added.) Yet the court could also conclude, ". . . Acting under its commerce power, the federal government thus can order the states to operate *their transportation systems* in accordance with federal regulations designed to protect the health of the nation's citizens by requiring them to purchase buses and construct exclusive bus lanes." (App. A, p. 288; emphasis added.)

Turning again to the lower court's favored 1890's analogy, it is submitted that it breaks down if the present regulations are applied to a "now-for-then" fact situation. If the Administrator of 1890 had said to California, "Horses are dirty creatures. We want freight to move by rail, so we

can cut down on the number of horses on the roads. Now, to do that, you buy 475 box cars and give them, or the money, to the Southern Pacific Railroad." Then we would have the present regulation-situation.

There is a vast difference between telling a state: If you operate a facility for public service, you shall operate it in the safest manner presently known; and telling that same state: For the public good, you shall give this other agency $16,625,000 (475 buses at $35,000, conservative cost of a standard bus) to decrease pollution by the general public. For one thing, the appropriation of tax monies is a legislative function. Under the Administrator's plan, the General Assembly of Virginia would be reduced to the sole function of assessing taxes after they have been appropriated by the Administrator.

The lower court found that the Washington Metropolitan Area Transportation Compact, Pub. L. 89-774, 80 Stat. 1324 (Nov. 6, 1966); Chapter 2, [1966] Virginia Acts of Assembly 5, meant that Congress had given its approval to a means of funding, so as to validate the Administrator's regulation, saying, ". . . The most that could be criticized in the regulation might be a technical error in leaving open the possibility that these commitments may be made directly to WMATA by the states rather than *from the states to Districts and thence to WMATA.*" (App. A, p. 298; emphasis added.) This logic is tainted with the same flaw as that in the railroad analogy—each assumes to be a fact that which is not a fact.

Title III, Article VII, § 16, of the Compact, declares as a policy, ". . . that, as far as possible, the payment of all costs shall be borne by the persons using or benefiting from the Authority's facilities and services and any remaining costs shall be *equitably shared* among the *federal,* District of Columbia and *participating local governments* in the

zone." (App. B, emphasis added.) Financing on the Virginia side of the zone is to be done by contracts between local governments and Northern Virginia Transportation District and WMATA, or betwen the local governments and WMATA. The Commonwealth of Virginia is not committed to any financing of WMATA projects, either directly or indirectly.

The Adminstrator would create a new compact, not merely carry out existing provisions of the existing compact. This the Constitution of the United States says he cannot do, [U.S. Const. Art. I, § 10] even under the guise of unilaterally requiring three separate contracts with one purpose.

It is a new compact, for he has conveniently omitted one of the parties in the financing; a party who is bound by the present compact to share "equitably" in the cost of mass transit plans; a party which has available more funds than all the other parties combined—the Federal Government. It is interesting that the Administrator should forget that party. It may be that the same mental myopia seized his faculties when he required the Commonwealth of Virginia to establish an exclusive bus lane on the George Washington Parkway; a facility constructed, maintained, and regulated by the Federal Government.

An equally compelling reason for retaining the federal presence in the "mass transit as an alternative to personal automobile travel picture" is that the Federal Government is the largest single employer in the District of Columbia area [38 Fed. Reg. 33704 (Dec. 6, 1974)], thus it generates much of the commuter automobile travel the Administrator's regulations are designed to limit, if not halt. If the Administrator can get the commuters on the buses, a large percentage will be there because they are federal employees, and because of this federal action. Increasing the bus fleet

to handle the additional riders the Administrator is creating, is certainly a federal problem, at least in part. The Administrator claims to be following Congressional policy by getting the commuters out of the automobiles and into the buses. It is our position, however, that Congress did not say the Commonwealth of Virginia should be obligated to spend over $5,500,000 to carry out that Congressional policy.

The Administrator claims that he has the power to control the use of highways and streets of Virginia because the Commonwealth in times past adopted certain transportation policies which encouraged automobile travel, such as, building and maintaining highways, thus making automobile and truck travel more efficient and safer, and, thereby, encouraging the use of motor vehicles for commerce and pleasure. He most conveniently forgets, however, the federal participation in, and encouragement of those policies. The Congress, as a matter of federal policy, has declared that it is in the national interest to accelerate the construction of federal-aid highway systems. 23 U.S.C. § 101(b) (1973) [The policy here enunciated was enacted in 1958]. It must be remembered that highways are not nuisances, *per se,* and are used for other than commuting purposes. Federal participation in the cost of constructing highways in Virginia is justified, among other reasons, because of their need as avenues in event of national emergencies.

If it is to be federal policy that highways and buses are coterminous then this concept must be supported by federal funds. It is unconscionable to allow the Administrator to postulate that Congress has changed its well established position and at the same time impose the entire obligation for the resulting consequences on Virginia. Only the Federal Government through Congressional action has the means to satisfy the Administrator's determinations. If Congress does not see fit to provide buses, the Administrator may not

decide for himself that Congressional policy favors more buses, and provide for them from the Treasury of Virginia.

Federal policies may modulate with each passing wind if the cost and responsibilities of those changes may be shifted by an Executive promulgation to the states or localities. If the total cost is to fall upon the states, then we are saddled with the worst of all possible governments: having the strong national government of the present United States Constitution, but the state financing of the Articles of Confederation.

If the states must be responsible for total funding, then they may well assume they can assert authority over the project thus purchased. If the states are to be merely tax gathering organizations for the Executive branch of government, then Congress becomes merely an appendage of the Executive will. Allowed to proceed in this unrestrained manner, the Executive branch supersedes both the national legislature and state government; consequently, the checks and balances concept of our system of government is rendered nugatory.

It cannot be that this is the New Federalism; assuredly, it is no Old Federalism. Not only does it deny a republican form of government to this State, but to the nation as well.

If such policies are not restrained by this Court, nothing shall prevent the Executive branch, under the scope of an act of Congress, from using such legislation as a springboard to compel the states or localities to finance any conceivable project. In the instant cases, since apparently in the lower court's reasoning the financial burden is unimportant (App. A, p. 295), the Administrator would be just as readily justified in ordering the three jurisdictions in question to provide the entire balance of the financing for the WMATA subway project as he did in directing the present action.

This issue is important, not just to Maryland, District of Columbia, and Virginia, but to every state. The Clean Air Act has only begun to be applied. The major urban areas will be followed by the smaller urban areas, until eventually every town and hamlet will have emission and transportation controls. It is a national problem which the states cannot and should not finance. Notwithstanding this fact, unless the Administrator is checked at this relatively early stage, the trend of human nature will be to conjure up more and more elaborate plans and controls. With no budget to limit his promulgations, there will be no sense of proportion or responsibility. Power without responsibility produces an unhealthy situation, whether in the private or the public sector.

There is no credible evidence that can assure anyone at this particular stage in the study of the pollution problem that, once sufficient buses are provided, the commuter will utilize such transportation. It is an unconscionably expensive test for Virginia, since, not only does she lose control over her own budget and administration but can be financially constricted at the capricious whim of a nonresponsive entity. This Honorable Court is the only agency now available to restore the balance which is essential to reestablish harmonious state and federal cooperation in the solution of a pervasive problem.

CONCLUSION

This case involves the interpretation of a federal statute in such a way as to constitute a drastic invasion of traditional state action. The degree of federal preemption affirmed by the lower court, however, cannot be sustained on the basis of either actual conflict with state laws, or an unmistakable expression of statutory intent. In addition, the regulations which compel the construction of bus lanes and the com-

mitments to purchase additional buses are an attempt to extend the Administrator's power to a degree which is statutorily and constitutionally impermissible. Finally, the decision in the instant case differs in significant aspects from the decisions issued by other Circuit Courts of Appeals which addressed essentially identical questions. For these reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Petition for a Writ of Certiorari was served by mailing three true copies thereof, postage prepaid, to: The Solicitor General, Department of Justice, Washington, D. C. 20530; Robert V. Zener, General Counsel, U.S. Environmental Protection Agency, Washington, D. C. 20460; John C. Salyer, Office of Corporation Counsel, District Building, Washington, D. C.; Martin A. Ferris, III, Assistant Attorney General, State of Maryland, O'Connor State Office Building, 201 W. Preston Street, Baltimore, Maryland 21201; Stephen M. Pratt, 4009 Chain Bridge Road, P. O. Box 537, Fairfax, Virginia 22030; J. Howard Middleton, Jr., City Attorney's Office, 320 King Street, Suite 200, Alexandria, Virginia 22314, Clarence M. Ditlow, 1412 Foxhall Road, N.W., Washington, D. C. 20007, all on this the 23rd day of January, 1976.

J. THOMAS STEGER
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